92-296

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No._____

MICHAEL K. SCHMIER and
MICHAEL K. SCHMIER, A PROFESSIONAL
CORPORATION, Petitioners,

v.

TERRY S. KAPLAN, MICHAEL A. LOTMAN,
COLLISSON & KAPLAN, LAWRENCE BROOKS,
BROOKS INDUSTRIES, INC., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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Counsel for Petitioners

I.

QUESTIONS PRESENTED

Whether sections 639(e) and 645.1 of the California Code of Civil Procedure are violative of the right to petition the Government provision of the First Amendment of the Constitution of the United States and of the Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth and Fifth Amendments when applied to force litigants to use and pay for a private referee to hear and determine all discovery motions and disputes, and petitioners not so doing, to strike their pleadings and to terminate them.

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II.

OPINION BELOW

The opinion of the Supreme Court of California, not reported, appears in the appendix hereto, p. 2a, infra, The opinion of the California Court of Appeal, Second District, reconsideration denied without comment, neither reported, are reprinted in the appendix hereto, p. 4a and 3a, respectively, infra. Portions of the September 14 and October 3, 1990 trial court transcripts pertaining to trial court findings and orders on this issue are quoted herein and the trial court order dated October 15, 1992, not reported, is reprinted in the appendix hereto, p. 13 a, infra.

JURISDICTION:

The judgment of the Supreme Court of California was entered on May 14, 1992 and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 USC section 1257(3).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES:

First Amendment, United States Constitution:

Congress shall make no law. . . abridging. . . the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution:

. . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifth Amendment, United States Constitution:

No person shall. . . be deprived of life, liberty, or property, without due process of law;

California Code of Civil Procedure

[CHAPTER 6 REFERENCES AND TRIALS BY REFEREES]:

[Section] 639. By Court Order--Grounds.

When the parties do not consent, the court may, upon the application of any party, or of its own motion, direct a reference in the following cases:

(e) When the court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.

[Section] 645.1 Payment of Referees' Fees.

The court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed pursuant to section 1023, in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties.

* * * * *

IV.

STATEMENT OF THE CASE:

Petitioners Michael K. Schmier and Michael K. Schmier, a Professional Corporation brought an action against respondents Terry Kaplan and others for fraud, etc. The case was consolidated with a pending 1/ legal malpractice action against petitioners filed by some of the same defendants in this case.

On May 11, 1990, the trial court ordered a reference of discovery disputes to a privately paid referee pursuant to California Code of Civil Procedure section 639, subdivision (e) and section 645.1. On June 15, 1990, the trial court clarified that his order broadly referenced "all pre-trial matters", including pending dispositive summary judgment motion(s). On about June 27, 1990, the referee first demanded a $5,000 advance retainer fee, then without a court order. That day, petitioners protested the reference on federal constitutional grounds to the Los Angeles Superior Court Presiding Judge; to the California Judicial

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1/ Appeal of which is pending before the California Court of Appeal.

Council; and to the California Commission on Judicial Performance, which requested that petitioners delay a motion to vacate the reference to enable its investigation to develop first. The referee was shortly advised. On about July 31, 1990, the referee mail served a proposed order to change the trial court's allocation of the referee's fees to increase the portion charged to petitioners from about "one fifth" to "one half". On August 6, 1990, petitioners, again claiming federal constitutional grounds, filed with the trial court a motion to vacate the reference. On September 14, 1990, the trial court denied the motion to vacate and warned petitioners to pay the referee's demanded fees and advance retainers by September 28, 1990 2/ or face possible terminating dismissal or default sanctions. On September 28, 1990, petitioner filed a petition for a writ of mandate/prohibition/stay with the California Court of Appeal, again claiming federal constitutional grounds, which was denied on October 1, 1990:

"if respondent court imposes the sanction of

2/The referee's award of $3,700 discovery sanctions was not made due until October 15, 1990.

striking petitioner's answer to the complaint in case No. C 691691 and striking petitioner's complaint in case No. C 742595, petitioner will have adequate remedy at law by way of appeal once judgment is entered . . ."

On October 3, 1990, the trial court dismissed all petitioners' pleadings holding that the reference order's constitutionality would have to be decided by appellate courts. The California Court of Appeal affirmed the dismissal of the complaint in case No. C 742595 and the California Supreme Court denied review.

V.

RAISING THE FEDERAL QUESTION

At the early stages of the reference below the petitioners raised, including in a motion to vacate the reference, that sections 639(e) and 645.1 of the California Code of Civil Procedure violated the federal Constitution for repugnancy to rights to access to the courts, to due process of law and to equal protection of

the laws as provided in the First, Fourteenth and Fifth Amendments to the United States Constitution. The trial court denied the motion to vacate the reference, terminated petitioners as a sanction for not paying the referee's fees and held that constitutionality would have to be decided by appellate courts:

> "this [forced reference] is an area of law that hasn't been investigated thoroughly, and you may be correct [that it is unconstitutional] . . . I think that this case will eventually end up before the Supreme Court
>
> . . . I'm at a loss to know how to proceed in this case. . . I may be wrong. . . I have been wrong more than once and you have. . . adequate relief to determine whether I am wrong. . . the reference may be very appropriate, which I believe it is, and valid, which it may be. Notwithstanding that, we don't have any agreement expressed from [petitioners]. . ."

(1 Tr. #3, pg. 4, lns. 15-16, pg. 8, lns. 9-13, 1 Tr. #2,

pg. 7, ln. 28-pg. 8, ln. 15) 3/.

The federal constitutional claims were reiterated by petitioners before the California Court of Appeal which wrote (page 7, footnote 4):

"We find no merit to [petitioners'] argument the reference denied him due process." 4/

3/ Citations are to transcripts in the California Court of Appeal record.

4/ The California Court of Appeal held that its basis for affirming the termination of petitioners was their failure to pay the monetary sanctions, which were imposed by the referee, as distinguished from not paying the referee's fees. This put the cart before the horse because if forcing the use, and payment of the referee is unconstitutional, then the sanctions the referee imposed are invalid. This device unfairly swept aside the federal constitutional claim.

Interestingly, the monetary sanctions were not even due at the time the trial court terminated the petitioners.

Non-payment of the referee's fees created the procedural vehicle enabling the federal constitutional challenge, which could have been mooted by their payment. Because this vehicle for appeal was expressly contemplated by the trial court, petitioner did not "flout" any order, nor was there any contumacy or contempt.

That the Court of Appeal's treatment was artificial is plain from the trial court's verified answer to petitioners' disqualification for cause motion where he wrote that the failure to pay the referee's fees, not the monetary sanctions, caused the terminations:

"[the terminations were] imposed. . .for failure to pay reasonable fees to the duly appointed referee. . . after due warning. .

(continued...)

As indicated, the federal constitutional issues were reiterated by petitioners before the Supreme Court of California which denied review, thus rejecting these federal claims.

VI.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE UNCONSTITUTIONALITY OF FORCED DISCOVERY REFERENCES

The California Supreme Court judgment is in conflict with decisions of this Court [this Court's Rule 10.1(c)].

(1) The First Amendment right to petition the Government includes the rights of access to the courts,

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4/(...continued)

> . the court dismissed his complaint in one case and struck the pleadings in the second and entered a default judgment [$1,045,017.65]. I have not prejudged this case. . . "

McDonald v. Smith, 472 U.S. 479, 484 (1985). The government cannot constitutionally condition the exercise of such a First Amendment right on payment of fee unless it shows an overriding governmental interest, Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 480 U.S. 575 (1983). The trial court cannot broadly condition parties' access to court on the payment of fees to a private arbiter, or so condition the parties' First Amendment rights to so petition a court.

This Court has rejected claims that a trial court's heavy case load and an extremely "congested calendar" justified references, held them to be neither necessary nor permissible, held them to be "an abuse" of the trial court's power which:

> " . . . amounted to little less than an abdication of the judicial function. . . "

and ordered such references vacated as:

> "[t]he use of masters is to aid judges in the performance of specific judicial duties, as may arise in the progress of a cause. . . and not to displace the court."

La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957).

The Court has otherwise held impediments to open and equal access to the courts unconstitutional, Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), see also, Burns v. Ohio, 360 U.S. 252 (1959), Smith v.Bennett, 365 U.S. 708 (1961), Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

(2) Due process is offended by a reference to a non-judge and also when any person has such a direct monetary interest in a case. Due process is violated whenever an arbiter has an actual or possible pecuniary interest in the outcome of a decision:

> "[Due] process. . . is not satisfied by the argument that men of the highest honor and greatest self-sacrifice could carry it out without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof. . . or which might lead him not to hold the balance nice, clear and true"

denies due process. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Due process is violated if an arbiter can predict that a certain decision will bring him more cases and thus enhance his income. Gibson v. Berryhill, 411 U.S. 564 (1973).

On the other hand, a court does not diminish its potential compensation by cutting off discovery. The end of a case is irrelevant to a court's income. A court is not paid for the length of a hearing or the plentitude of briefs read. For a court, the identity or number of parties involved; or the scope of its activities; or the nature of its rulings are all devoid of pecuniary implications. A court does not profit from complexity. A referee does. And this violates the parties' due process right to an arbiter with no actual or pecuniary interest in the outcome. The abridgement arises from the interest, not from the man.

Cutting off discovery would guarantee that a discovery referee can no longer charge the parties. A referee thus an incentive to deny a motion to cut off discovery and the incentive disqualifies him regardless of actual bias. Any ruling which places greater burdens on a party will generate greater fees. Or a referee may

create tasks for the parties, or for himself. The incentive is to expand, not contract the scope of activities.5/ A reference creates a pervasive pecuniary interest in a private arbiter, without a compelling state interest.6/

The Court has also held that, like here, dismissal of an action or entering default as "punishment" for failure to pay is not designed to seek discovery and violates due process, Hovey v. Elliott, 167 U.S. 409 (1897), see Societe Internationale v. Rogers, 357 U.S.

5/Due process concerns were a basic reason Congress supplanted federal court commissioners (who were paid by the case) with salaried magistrates. The Senate Judiciary Committee Subcommittee staff rightly noted that Tumey v. Ohio "has raised grave doubts as to the constitutionality of the present system of compensation." Federal Magistrates Act: Hearings on S. 3475 and S. 945, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 277-278 (1966-67).

6/A reference fails to fulfil a purpose widely claimed to justify it, viz: saving the court time and work. Contrary to this justification, the losing party before the referee commonly goes back to the court to seek reversal (which, unless a rare de novo, allows the non-judge referee unfairly to frame the issues and greatly influence the court). Instead of saving the court time and work, the court must review the referee's disposition in addition to the parties' positions which adds to its work, adds another round of expense for all parties and protracts the litigation.

197 (1957); Hammond Packing Co. v. Arkansas 212 U.S. 322 (1909).

(3) The Equal Protection Clause is seriously offended by forcing payments for private referee's fees and advance retainer demands.7/ Wealthy or insured litigants are given an enormous advantage over poorer or uninsured litigants because the wealthy have the ability to fund the referee's fees and not be put out of court by any inability to pay them. It is no answer that such fees may eventually be recoverable by the prevailing party as costs because the immediate ability to defray the fees, i.e. the economic staying power of a particular party, then alone can determine the prevailing party, albeit unfairly. Each party must weigh the impact to all of the referee's fees before bringing any motion. This may have a "chilling effect" on impecunious parties and encourage other parties to browbeat less well heeled opponents and thus foster frivolous litigation.

7/Petitioners did not pay the referee's demanded advance retainer fee as part of the challenge to the reference order. Respondents then wrote the referee tendering their second check to defray the portion demanded from petitioners, but this was rejected.

There is no access to the court except through first paying the referee. That referees' fees inevitably so become an offensive weapon in a discovery war is simply unfair. In Griffin v. Illinois, 351 U.S. 12 (1956), the Court addressed the Equal Protection Clause when it wrote:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

and

> "[E]xpenses which do not totally preclude, but which block effective access to the courts for the poor may deny equal protection"

[footnote to Gardiner v. California, 393 U.S. 367 (1969), Roberts v. LaVallee, 389 U.S. 40 (1967), cf. Mr. Justice Brennan's concurrance in part in Boddie v. Connecticut 401 U.S. 371, 388-389:

> "Connecticut. . .denies [a hearing] to those who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment [under the Due

Process Clause] can be tested as well under the Equal Protection Clause. . .Courts are the central dispute settling institutions in our society. They are bound to do equal justice under the law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely "the kind of a trial a man gets", Griffin v. Illinois. . . but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee."

(4) The Fourteenth Amendment to the Constitution of the United States provision that no State shall make or enforce any law which shall abridge the privileges of citizens encompasses protection of these rights to access to the courts, due process and equal

protection.

The California Supreme Court judgment affirming a statute permitting forced delegation to, and payment to a private discovery referee abridges the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth and Fifth Amendments8/ and should be reversed.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE UNCONSTITUTIONALITY OF FORCED DISCOVERY REFERENCES

The California Supreme Court disposition is in conflict with decisions of the United States Courts of Appeals [this Court's Rule 10.1(b)].

A trial court may not delegate its day to day functions to a referee without a stipulation, In re United

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8/See generally "Private Means to Public Ends: Implications of the Private Judging Phenomenon in California", 17 UCD L.R. 611 (1986) and "The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts", 94 Harvard L.R. 1592 (1981).

States, 816 F.2d 1083, 1091 (6th Cir. 1987), Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 712 (7th Cir. 1984), cert den. 469 U.S. 1018 (1984); TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972).

Free access to the courts has been held fundamental under the Equal Protection Clause. In Lee v. Habib, 424 F.2d 891, 900-902 (D.C. Cir. 1970), it was held:

> "Court procedures which of themselves invidiously discriminate between rich and poor impair guarantees of equal justice which the Constitution was designed to protect
>
> . . . the constitutional mandate that there be no invidious discrimination between indigent and rich litigants is being recognized in the civil courts as well. . . The right of all to have free access to the courts is basic to our democratic system. It too cannot be conditioned upon the payment of a fee where such a condition precludes

the exercise of the right. . ."

The ability to be heard by a court:

> "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. . ."

The California Supreme Court judgment conflicts with these Courts of Appeals and should be reversed.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING POLICY PROBLEMS CONCERNING FORCING CIVIL LITIGANTS TO USE AND PAY FOR PRIVATE DISCOVERY REFEREES ON PENALTY OF TERMINATION

Delegation of court responsibility to non-judges and forcing payment therefor involves important public policy concerns with far reaching impact. Recently there has been pervasive escalation in the number of forced discovery references. This precludes access to the civil courts for a large proportion of litigants who are uninsured or unable to afford private referees and

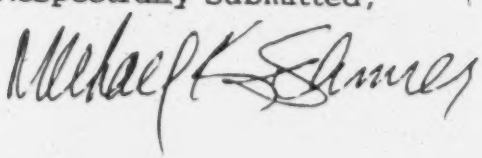
otherwise removes substantive day-to-day litigation dispositions from trial courts. This is not alternative dispute resolution by agreement, but rather, unwelcome abdication which prevents parties from practical access to public courts. It is bad policy and bad practice and should be stopped at once.

VII.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of California.

Respectfully submitted,



Michael K. Schmier
5000 Union Plaza
333 Washington Ave., N
Minneapolis, Mn. 55401
Counsel for Petitioners

August 10, 1992

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. _____

MICHAEL K. SCHMIER and
MICHAEL K. SCHMIER, A PROFESSIONAL
CORPORATION, Petitioners,

v.

TERRY S. KAPLAN, MICHAEL A. LOTMAN,
COLLISSON & KAPLAN, LAWRENCE BROOKS,
BROOKS INDUSTRIES, INC., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

APPENDIX

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

Collisson & Kaplan
Terry S. Kaplan
1888 Century Park East
Suite 1700
Los Angeles, CA 90067

Re: Brooks Industries, Inc.
vs.
Schmier , Michael K.
2 civil B055266
Los Angles No. C691691

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 2/19/92 is now final.

* * Affirmed in Full * *

Respondent to Recover Costs on Appeal.

JOSEPH A. LANE, Clerk

By: D. Potter
Deputy Clerk

June 1, 1992

Second Appellate District, Division Seven, No. B055266
S025889

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

MICHAEL K. SCHMIER, Appellant

v.

TERRY S. KAPLAN Et al., Respondents

SUPREME COURT
FILED
MAY 14, 1992

Robert Wandruff
Clerk

Appellant's petition for review DENIED

LUCAS

Chief Justice

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN: 7 DATE: 03/11/92

Michael K. Schmier
333 Washington Avenue, N.
5000 Union Plaza
Minneapolis, Mn. 55401

RE: Brooks Industries, Inc.
vs.
Schmier, Michael K.
2 Civil B055266
Los Angeles No. C691691

THE COURT:

Petition for rehearing denied

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL K. SCHMIER	)	No. B055266
	)	
Defendant and Appellant,	)	(Super.Ct.No. C 742595)
	)	
v.	)	
	)	[COURT OF APPEAL
TERRY S. KAPLAN, et al.,	)	SECOND DIST
	)	
	)	FILED
Plaintiffs and Respondents.	)	FEB 19 1992
	)	ROBERT N. WILSON
	)	.....
		Deputy Clerk]

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Hubbell, Judge. Affirmed.

Michael K. Schmier attorney for Appellant.

Julian A. Pollok for Respondents Lawrence Brooks and Brooks Industries, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker and Martin K. Deniston; Collisson & Kaplan, Terry S.

Kaplan, Jordan Trachtenberg, and George A. Kaufman, attorneys for Respondents.

The trial court struck plaintiffs' complaint for refusal to pay discovery sanctions and the referee's fees incurred in the reference of the discovery motion. Plaintiffs appeal from the judgment of dismissal. We affirm.

FACTS AND PROCEEDINGS BELOW

Plaintiffs Michael K. Schmier and Michael K. Schmier, a professional corporation (hereinafter Schmier) brought an action against defendants Kaplan and others for fraud, breach of contract and interference with prospective economic advantage. The case was assigned to the superior court's delay reduction (Fast Track) program and consolidated with a pending action against Schmier filed by some of the same parties named as defendants in this case.1/

Defendants filed motions to compel Schmier's attendance at a deposition, production of documents and

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1. An appeal from this action is pending before Division Five of this court. (B059364)

further answers to interrogatories which Schmier opposed. The trial court ordered a reference of the discovery disputes pursuant to code of Civil Procedure section 639, subdivision (e).2/ The referee recommended the motions be granted and Schmier be sanctioned in the amount of $3700. The referee served his written recommendations on the parties. Schmier filed written objections to the recommendations and a motion to vacate the reference. The trial court overruled Schmier's objections to the discovery report and adopted the referee's recommendations. The court also denied Schmier's motion to vacate the reference. Schmier was ordered to pay the sanctions and his share of the referee's fees by September 28, 1990. The trial court warnded Schmier failure to pay the amounts ordered would result in a termination of his action.

A status conference was held on October 3, 1990. At the status conference Schmuer admitted he had not paid the sanctions and fees ordered by the court and renewed his objections to the reference. The court

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2. All future statutory references are to the Code of Civil Procedure unless otherwise noted.

again rejected these arguments and asked Schmier if he intended to pay the sums ordered at the previous hearing. Schmier replied, "It is not my intention to pay them." The court responded, [T]hen I am really left with no further alternative than to strike your . . . pleadings."

A judgment dismissing Schmier's action was entered and Schmier appealed. For the reasons explained below, we affirm.

DISCUSSION

I. DISMISSAL OF SCHMIER'S ACTION FOR FAILURE TO PAY DISCOVERY SANCTIONS WAS NOT AN ABUSE OF DISCRETION.

The trial court dismissed the Schmier action on two independent grounds: refusal to pay the monetary discovery sanctions ordered by the court and refusal to pay the referee's fees incurred in determining the discovery motion. Because we find Schmier's refusal to pay the monetary discovery sanction justified dismissing his action we do not discuss the alternative ground.

Schmier argues the dismissal sanction was an abuse of discretion because the underlying monetary

sanction itself was an abuse of discretion, and dismissal was too harsh a penalty to impose under the circumstances of this case. We have considered Schmier's arguments and find them unpersuasive.

Schmier's first argument is that ordering a reference of the discovery motions was an abuse of discretion because such a reference was not "necessary" as required b section 639, subdivision (e).3/

Schmier did not object to the lack of necessity when the trial court made its reference order, thus the argument was waived.

In any event, the exercise of that discretion will not be overturned appeal absent a showing the trial court's action was arbitrary, capricious or without basis in reason. (Denham v. Superior Court (1970) 2 Cal.3d 557, 566.) Schmier has not made such a showing here. The motions required review of 55 categories of

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3. Section 639 authorizes the court to order a reference, "(e) When the court in any pending action determines in its discretion that it is necessary for the court to appoint referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon. Section 639, subdivision (d) leaves the question of necessity to the court's discretion.

documents defendants sought to have produced as well as evidence regarding the scheduling of depositions and Schmier's failure to attend.

Schmier's second argument is that the monetary sanction was an abuse of discretion because Schmier had a reasonable basis for the positions he took on the discovery issues. The referee found otherwise as did the trial court which independently reviewed the referee's proposed decision. We find no basis in the record or the briefs for disturbing these decisions.

Schmier next argues the sanction award was improper was a matter of law because Schmier made a good faith attempt to meet and confer on the discovery issues and there was no showing the disclosure would be a practical benefit to the parties seeking discovery. We have found no case that supports the proposition a party is immune from sanctions if the party meets and confers with the opposition on discovery requests. The case cited by Schmier, Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 122 Cal.App. 3d 326, does not support Schmier's position. That case held a party who brings a motion to compel

discovery without making a reasonable attempt to resolve the dispute may be sanctioned if the motion to compel is denied in whole or part. (Id. at p. 330-331.) Nor is there any support for the proposition sanctions can only be awarded if the moving party can show prejudice from respondent's refusal to cooperate in discovery. Such an argument was rejected as "without foundation" in Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 886, footnote 9 which noted the difficulty of a party proving prejudice from "not learning what he hasn't learned and doesn't know."

Schmier contended the amount of the sanction, $3700, was unreasonable. The amount is supported by the hours and billing rate of respondent's counsel contained in the record.

Finally, Schmier contends the sanction of dismissal was too harsh a penalty to impose solely on the grounds he had failed to pay monetary sanctions ordered by the trial court. (See Midwife v. Bernal (1988) 203 Cal.App.3d 57, 65.) Terminating sanctions have been held to be an abuse of discretion unless the party's violation of the procedural rule was wilful (Ruvalcaba v.

Government Employees Ins. Co., (1990) 222 Cal.App. 3d 1579, 1583-1584; Moyal v. Lanphear, (1989) 208 Cal.App.3d 491, 503; Thomas v. Luong (1986) 187 Cal.App.3d 76, 82-83; Stein v. Hassen, (1973) 34 Cal.App. 3d 294, 302) or, if not willful, at least preceded by a history of abuse of pre-trial procedures, or a showing less severe sanctions would not produce compliance with the procedural rule. (Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal.App.3d 481, 489, ["Where, as here, the record is replete with instances of delay and failure to comply with a court order, dismissal may be proper."]; Thomas v. Luong, supra, 187 Cal.App.3d at p. 81 [default abuse of discretion where no showing "lesser sanction will serve to protect the legitimate interests of the (other) party . . ."].)

Contrary to Schmier's assertion, the trial court did not dismiss his action solely only the ground he failed to pay the discovery sanction. Schmier told the court he had no intention of paying the sanction. Having chosen to flout the court's order, Schmier cannot now complain about the dismissal. It is clear no lesser

sanction would have been effective.4/

II. SANCTIONS FOR A FRIVOLOUS APPEAL ARE NOT APPROPRIATE IN THIS CASE

Although we have ruled against him, we cannot say Schmier's arguments are "totally and completely without merit." (In re Marriage of Flaherty (1932) 31 Cal.3d 637, 650.) Thus, we deny respondents' request for sanctions against Schmier for bringing a frivolous appeal.

DISPOSITION

The judgment of dismissal is affirmed.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (Fred), J.

4. We find no merit to Schmier's argument the reference denied him due process. (Cf. Sauer v. Superior Court (1987) 195 Cal.App.3d 213, 225-226.)

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FILED
OCTOBER 15, 1990

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BROOKS INDUSTRIES, INC., doing business as PARKVIEW FURNITURE MFG. CO. and PARKVIEW OCCASIONAL SEATING, Plaintiff vs. MICHAEL K. SCHMIER, an individual, MICHAEL K. SCHMIER a Professional Corporation and SCHMIER & SCHMIER, a Law partnership, and DOES 1 through 20, inclusive, Defendants AND RELATED CROSS-ACTION	Case No. C691691 742595 ORDER DISMISSING COMPLAINT IN CASE NO.C 745595, DISMISSING CROSS-COMPLAINT IN CASE NO. C 691691 STRIKING ANSWER ENTERING DEFAULT IN CASE NO. 691691

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

The status conference for this action came on for hearing on October 3, 1990 with the following parties appearing by the following attorneys:

1. Michael K. Schmier, Michael K. Schmier, P.C. and Schmier and Schmier (collectively referred to herein as the ("Schmier Parties") appeared by and through Michael K. Schmier;

2. Brooks Industries, Inc. appeared by and through Terry S. Kaplan and Jerome S. Billet;

3. Brooks Industries, Inc. and Larry Brooks appeared through Julian Pollok: and,

4. Terry S. Kaplan, Michael A. Lotman and Collisson & Kaplan appeared through Martin K. Deniston of Wilson, Elser, Moskowitz, Edelman & Dicker.

The Court having reviewed the filed and records in this matter and being familiar therewith and after inquiring of counsel and obtaining information therefrom makes the following findings:

(a) Michael K. Schmier is attorney licensed to practice before the courts of the State of California;

(b) On May 11, 1990 this Court appointed Retired Justice Richard Amerian as Referee to hear discovery disputes and to render recommended decisions in connection therewith to the Court pursuant to C.C.P. Section 639(e);

(c) On June 15, 1990 this Court suggested that the parties in attendance at the status conference consent to the appointment of Retired Justice Richard Amerian as Referee to hear law and motion matters and, at that the, the Schmier Parties appearing by and through Michael K. Schmier and Robert Esensten, consented to Justice Amerian's appointment as a referee to hear law and motion matters and render recommended decisions to this Court;

(d) The Schmier Parties participated in both discovery and law and motion proceedings before Justice Amerian, including but not limited to the scheduling, briefing and arguing of such motions and the Schmier parties, after the June 15 status conference, engaged in the scheduling of one or more hearings under summary judgment motions in Case No. C 742595 and in Case No. C 691691, appeared at the hearing of these motions,

obtained Justice Amerian's tentative conclusions and consented to further continuances of these hearings to permit the Schmier Parties to file further papers and engage in further briefing, and the Schmier Parties submitted such further briefings and then after consenting to the appointment of Justice Amerian to hear law and motion matters and voluntarily participating in the briefing, hearing and filing of their own motion for summary judgment before Justice Amerian, raised an improper and meritless objection to the appointment of Justice Amerian to hear any matters;

(e) The Schmier Parties, in response to three declarations submitted by three attorneys present at the status conference on June 15 who declared under penalty of perjury that Mr. Schmier had consented to Justice Amerian's hearing and recommending decisions to this Court for Law and motion matters, failed to submit any declaration contradicting these declarations by Robert Esensten who was then his counsel and who was present on June 15, and the Schmier Parties' consent was given in the presence of this Court;

(f) The Schmier Parties submitted to the Court

the Declaration of Michael K. Schmier which falsely claims that the Schmier Parties did not consent to the reference;

(g) The Schmier Parties in their Motion to Vacate the reference miscited case authority;

(h) The Schmier Parties have objected to each recommended decision rendered by Justice Amerian (each of which were adverse to Mr. Schmier) and the objections were meritless; in the presence of this Court Michael Schmier was advised that this Court was signing the recommended decisions making them rulings of this Court, including the award of sanctions against the Schmier Parties and orders to pay Justice Amerian the fees specified therein as allocated therein; Michael Schmier was present in Court on September 14, 1990, and was orally ordered to pay said fees and sanctions and that Michael Schmier, on behalf of the Schmier Parties, was warned by this court of September 14, 190 that the failure to pay the fees and/or sanctions by September 28, 1990 could result in the striking of the Schmier Parties' pleadings in the actions, and where appropriate, entry of default; and this Court, before

signing the orders had analyzed the billing submitted by Justice Amerian and found the billing and allocation thereof as recommended reasonable, fair, just and equitable and consistent with the Court's Reference order and prior advisements to counsel;

(i) On October 3, 1990, the Court asked Mr. Schmier on the record if the Schmier parties intended to pay the referee's fees as ordered and the sanctions as ordered, and, despite being warned by the Court, Mr. Schmier stated to this Court the absolute refusal of the Schmier Parties to pay the foregoing fees or sanctions;

(j) The Schmier Parties have never claimed and have introduced no evidence that they are financially unable to pay the Referee's fees or the ordered sanctions;

(k) The Schmier Parties only raised objections to the Reference Order after Justice Amerian had ruled against them on three separate motions;

(l) The foregoing conduct of the Schmier Parties constitutes a premeditated, intentional and purposeful course of action taken by the Schmier Parties to avoid the Reference Order and this Court's orders without any

cause therefor;

(m) The Schmier Parties' foregoing conduct falls far below the minimum standards of compliance with court procedures required from litigants and their counsel (of which Michael Schmier is one) and constitutes trifling with the Court;

(n) The Schmier Parties have deliberately, flagrantly and without cause, reason or excuse refused to comply with this Court's Orders announced in open court on September 14, 1990 and reaffirmed on October 3, 1990 and have thus sought to delay the progress and ultimate resolution of this case, and have sought to interfere with the Court's control over the pace of this litigation and with this Court's management of this case;

(o) The Schmier Parties willfully engaged in the presentation and arguing of motions to Justice Amerian for both law and motion and discovery issues knowing that Justice Amerian was expending time and incurring fees chargeable at least in part to the Schmier Parties;

(p) The conduct of the Schmier Parties in improperly objecting to the reference as noted above and in failing and refusing to pay the referee unreasonably

delayed these proceedings. The Schmier Parties' continued refusal to pay the referee's fees in the face of summary judgment motions pending in both cases before the referee which have not been ruled upon by the referee (because the Schmier Parties have refused to pay those fees) and notwithstanding this Court's orders, ruling and advice of September 14, 1990 and the advice of the Schmier Parties, that they have additional discovery matters to be decided before trial, unreasonably and unnecessarily continues to delay the progress and prosecution of these fast track litigation matter;

(q) The Schmier Parties' conduct is in violation of California Code of Civil Procedure Section 575.2(b) and Los Angeles County Superior Court Rule 1109; and,

(r) The Schmier Parties' refusal to pay the referee and refusal to pay sanctions each, independently of the other, constitutes grounds for dismissing Schmier's Complaint in Case No. C742595 and striking the Schmier Parties pleadings in Case No. C691691.

THIS COURT HEREBY ORDERS, DECREES AND

ADJUDGES AS FOLLOWS:

Based on the foregoing and based on the independent and alternative ground of: (i) the Schmier Parties' failure to pay the referee's fees, (ii) the Schmier parties' attempts to avoid the Reference Order; and (iii) the Schmier Parties; failure to pay Court ordered sanctions on discovery motions:

1. The Complaint in Case No. C 742595 is dismissed with prejudice;

2. Defendants' Answer in Case No. C691691 is hereby stricken and the default of the Defendants therein is hereby ordered entered;

3. Defendants' Cross-Complaint is Case No. 691691 is hereby dismissed with prejudice; and

4. Defendants in Case No. C 742595 shall recover their costs.

DATED: October 15, 1990

/s/

HONORABLE RICHARD C. HUBBELL
JUDGE OF THE SUPERIOR COURT

Submitted by:

COLLISSON & KAPLAN
TERRY S. KAPLAN, P.C.
MICHAEL A. LOTMAN, P.C.
JORDAN TRACHTENBERG

By:_____
Jordan Trachtenberg

Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

No. 72-296

In The

Supreme Court of the United States

October Term, 1992

MICHAEL K. SCHMIER and MICHAEL K. SCHMIER, A PROFESSIONAL CORPORATION,

Petitioners,

vs.

TERRY S. KAPLAN, MICHAEL A. LOTMAN, COLLISSON & KAPLAN, LAWRENCE BROOKS, BROOKS INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division 7

RESPONDENTS' BRIEF IN OPPOSITION

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No. 72-296

In The

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October Term, 1992

MICHAEL K. SCHMIER and MICHAEL K. SCHMIER, A PROFESSIONAL CORPORATION,

Petitioners,

vs.

TERRY S. KAPLAN, MICHAEL A. LOTMAN, COLLISSON & KAPLAN, LAWRENCE BROOKS, BROOKS INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division 7

RESPONDENTS' BRIEF IN OPPOSITION

THERE IS NO BASIS HERE FOR THIS COURT TO GRANT PETITIONERS' A HEARING

The petition inaccurately states the facts and the law relied upon in the underlying California case upon which petitioners seek

review. The misstatements include both omissions and outright misrepresentations to this Court. There is no federal constitutional question presented here for this Court's review. Moreover, petitioner's have waived any objection to the trial court's orders here and therefore are not entitled to review by this Court.

When the challenged discovery reference was first made by the trial court here, on May 11, 1990, petitioners did not object on any grounds.[1] Petitioners consented. Petitioners participated fully in the discovery reference process, including submitting briefs to and arguing to the referee — raising no objection at all to the judicial procedure in any of their submitted papers.

Likewise, when the advisory[2] reference of non-discovery motions was *suggested* by the trial court, on June 15, 1990, both petitioner Michael K. Schmier personally and petitioners' then counsel were present before the trial court and neither raised any objection upon any grounds to this separate reference. Again, both petitioner Schmier and petitioners' counsel participated in the advisory, non-discovery, reference process, including scheduling, briefing, arguing before the referee, and even to the extent of amending petitioners' pleading in response to the referee's recommended ruling on a motion for judgment on the pleadings before the trial court reviewed and adopted the referee's ruling. All this was done without any objection to the advisory non-discovery, reference.

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1. All discovery references under California Code of Civil Procedure Section 639 are advisory. The trial court reviews the referee's recommendations and any briefs regarding and/or objections to the referee's recommendations which the parties make, then the trial court schedules and hears argument on the recommendations and the trial court rules on the issues.

2. Petitioners omit to state that the broader reference here on motions other than discovery was also advisory, petitioners create the false impression in the petition that the referee was to make final rulings on substantive issues in the cases. He was not. The trial court was to and did fully review all recommendations of the referee, after briefing and argument by the parties.

Petitioners were informed by the referee's oral statement of his intended recommendations on July 31, 1990, that the referee would recommend that the trial court grant two motions to compel discovery against petitioners and award sanctions against petitioners of $1,334.00 and $2,330.50, respectively, on the two motions. Petitioners appeared again before the referee thereafter, on August 2, 1990, along with their counsel, and argued the respondents' summary judgment motion, without making any written or oral objections to the referee hearing the motion.

Only thereafter did petitioners object. On or about August 6, 1990, petitioners filed a motion to vacate the references and a motion challenging the referee's recommendations. The motion to vacate raised, for the first time, the constitutional issues raised in this petition. Therefore, petitioners' statement here that they raised the alleged constitutional issues "[a]t the early stages of the reference" is simply untrue.[3]

Three months had elapsed since the first reference and much had transpired under that reference and the second reference with petitioner's full participation. Plainly petitioners had consented to and participated in the reference procedures. Petitioners did not object until well after the initial recommended rulings were contrary to petitioners' position. This is the worst kind of "forum shopping," which should not be countenanced by this Court in any way. Petitioner's request for a hearing should be denied.

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3. Petitioners bald and unsubstantiated claims that, outside the record, petitioners allegedly raised constitutional issues herein by going to the California Judicial Council, the Los Angeles County Superior Court Supervising Judge, and the California Commision on Judicial Performance are unavailing and irrelevant. The burden upon a litigant and petitioner to this Court is to raise the constitutional issue in the subject proceeding, to give the trial court the opportunity to consider and rule upon that issue. This was not done here. Petitioners consented to the reference procedure and waived any constitutional objections they had to the references, fully participating until the initial recommendations of the referee were against them.

The case upon which review is requested here was decided on the grounds of petitioners' consent and waiver. The trial court in finding petitioners had consented to the reference procedure, specifically found a declaration submitted by petitioner Michael K. Schmier, claiming petitioners had not consented, was "clearly erroneous." The California Court of Appeal, whose decision was not reviewed by the California Supreme Court, upheld the trial court's ruling under the state law substantial evidence test, which provides an independent and adequate state ground for the underlying rulings. Therefore, there is no federal constitutional issue here for this Court to review.

STATEMENT OF FACTS

A fuller and more accurate statement of facts is necessary to reveal petitioners' omissions and misrepresentations of facts to this Court. On August 18, 1988 petitioner Schmier filed an answer to the complaint in the underlying malpractice action against him by respondent Brooks, denominated Case No. 691691 (hereinafter the "Malpractice Action") (1 Apx. Vol. I at 27-33).[4] No amended pleadings were filed. In November 1989, petitioner Schmier filed an action for fraud, breach of contract, and interference with prospective advantage against respondents, which action was denominated Case No. C742595 (hereinafter the "Schmier Action.") (1 Apx. Vol. I, 47-66). Both matters were eventually assigned to Judge Richard Hubbell in or about April, 1990.

On May 11, 1990 Judge Hubbell ordered the actions consolidated and, with several discovery motions pending in the consolidated actions, appointed retired California Appellate Court

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4. All references are to the record before the California Court of Appeal.

Justice Richard Amerian as discovery referee pursuant to California Code of Civil Procedure, Section 639(e) to hear discovery motions and to make recommendations to the trial court (1 Apx. Vol. II, 320-322.) Petitioners did not object on any grounds and, in their appeal in 2nd Civ. No. B055266, were held to have waived any objection to the discovery reference (Req. Jud. Not. Ex. "1" at 4).

On June 15, 1990, *with the consent of all counsel (including petitioners' counsel) and the consent of petitioner Schmier personally*, who were all then present before the trial court, the trial court issued a second order, appointing referee Amerian to hear and give advisory opinions on non-discovery law and motion matters (1 Apx. Vol. II, 322B; 1 Rsp. Apx. 72:16-74:2). Thereafter, counsel for all parties engaged in several telephone conference calls with Referee Amerian concerning the length of briefs, briefing schedules and hearing schedules regarding: (i) respondent Brooks' motion for judgment on the pleadings in the Malpractice Action; (ii) petitioners' motion for summary judgment in the Malpractice Action; and (iii) respondents' motion for summary judgment based upon California Civil Code, Section 47(2) in the Schmier Action. During those conversations, respondents' counsel never objected to the referee hearing law and motion matters (Apx. 1606-1607, 1657).

On July 31, 1991, pursuant to the briefing schedule confirmed by counsel with the referee, respondent Brooks' motion for judgment on the pleadings was heard by the referee. Petitioners' counsel and *petitioner Schmier personally* appeared before the referee. The merits of the motion were argued. Petitioners never raised an objection to referee Amerian hearing the motion either orally or in writing (Apx. 637-650). The referee then gave his oral recommendation to grant the motion, which he later memorialized in a written recommended decision dated August 16, 1990 (Apx.

1512-1518). Petitioners complied with this oral recommendation by filing an amendment to answer on August 20, 1990 (nearly one month *before* the trial court adopted said recommendation) (Apx. 1534-1537, Tr. 1; 7:23-8:5). Further, at that July 31, 1990 hearing, the referee advised petitioners that their brief on their motion for summary judgment then pending exceeded the 50-page limit previously set by the referee. Referee Amerian gave petitioners a time period within which to serve a new brief in compliance with the 50-page limitation (Apx. 1606-1607, 1646-1648). Petitioners did not object and complied with the referee's recommendation by filing an amended shortened brief (Apx. 1066-1128). The Kaplan firm gave notice of this recommended ruling to which neither petitioners nor his counsel objected (Apx. 1646-1648).

On August 2, 1991 petitioner Schmier and petitioners' counsel as well as respondents' counsel appeared to argue respondents' summary judgment motion in the Schmier Action. Petitioners had filed an opposition to said motion which did not include any objection to the referee hearing the motion (Apx. 792-828). The merits of the motion were argued before the referee.[5] No oral objection to the referee hearing the merits of the motion was made. After the hearing, the motion was continued on the referee's own motion to a later date to permit petitioner Schmier to file additional evidentiary opposition (Apx. 1606-1607, 1646-1648, 1657). Petitioners later filed an amended declaration as permitted by the referee (Apx. 1526-1533).

Therefore, between May 11, 1990 and August 2, 1990, petitioners and their counsel had participated in four hearings before the referee (on two discovery motions and on two law and

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5. For petitioner's benefit, the location of the hearing on both motions was moved from referee Amerian's office in Encino, California to the Los Angeles Superior Court courtroom of Judge Schifferman (Dept. 51) where petitioner's counsel, Mr. Esensten, was then engaged in trial (Apx. 859, 1516, 1620).

motion matters), participated in numerous conference calls with the referee, submitted several motions, oppositions and reply briefs to the referee, and had complied with several recommended rulings by the referee before the trial court reviewed and adopted those recommendations. Never once in any of the written or oral presentations mentioned above did petitioners object to the referee's status or inform the referee or the trial court that petitioners would not pay petitioners' portion of the fees. Instead, petitioner Schmier personally (an experienced attorney engaged constantly in labor law litigation) and petitioners' counsel continued to consent to the referee's appointment.

Despite this ongoing conduct, on August 6, 1990, petitioners *for the first time* gave notice to the trial court and respondents that petitioners had an objection to the referee hearing law and motion and discovery matters, by filing a motion to vacate the reference orders.[6] In the motion petitioners never claimed an inability to pay the referee's fees or the recommended sanctions. The motion was set to be heard September 14, 1990 (Apx. 877-905).

Petitioner Schmier's assertion in that motion and before this Court (App. Br. 17) that he "declined" telephone conferences with the referee is completely contradicted by the fact that his counsel participated in those conferences (Apx. 1606, 1619-1620, 1657). This is another miscitation of the record by petitioners here. Further, the petitioners' claim that petitioners advised the referee

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6. Notably, petitioners filed this motion only days after the referee served his written discovery recommendations and his oral recommendations on respondent Brooks' motion for judgment on the pleadings, all of which were adverse to petitioners. This was an apparent attempt to forum shop. Further, petitioners' claim that the Judicial Counsel advised petitioner Schmier to delay filing the motion to vacate the reference (App. Br. at 17, fn. 12) is not corroborated by his references to the appendix nor by any other part of the record. It is also irrelevant.

of the preparation of the motion to vacate is not supported by petitioners' reference to the record at the California Court of Appeal level (Apx. 1649) nor by any other evidence in the record. Petitioners' additional allegations (App. Br. 16-17) that the referee warned petitioner Schmier personally that the litigation would be "very expensive" and that the trial court specified that petitioners pay only "one fourth or one fifth" of the referee's fees rather than one half (as recommended by the referee) are only "supported" by petitioner Schmier's personal declaration filed with the motion to vacate, which the trial court later found to be "clearly erroneous." In that declaration, petitioner Schmier did not testify that he could not afford the referee's fees (Apx. 898-900). The motion to vacate was opposed timely (Apx. 1584-1653).

On September 14, 1990, petitioner's motion to vacate the reference order and his motion challenging the recommendations of the referee on three motions heard by referee Amerian, were heard and denied by the trial court. The trial court denied the motion to vacate the reference order, finding the reference proper and finding that all parties had consented to the non-discovery advisory reference, including petitioner Schmier personally. The trial court found that petitioner Schmier's declaration to the contrary was "clearly erroneous." (Tr. 1 at 4:74-7:22, 1 Apx. Vol. VIII at 1891:1-26; *see* order dated 10/15/90 attached to petition). The trial court also stated that petitioners' citation to the case of *Aetna Life Insurance Co. v. Superior Court*, 182 Cal. App. 3d 431, 277 Cal. Rptr. 460 (Cal. App. 1986) was "misleading to the Court."

The trial court then addressed petitioner's objections to the referee's recommendations on two discovery motions in the Schmier Action, to compel petitioner Schmier to respond to interrogatories and to compel petitioner Schmier to appear and produce documents at deposition. The trial court independently reviewed the court file, the pleadings on the motions and the

recommendations of the referee, which included a recommended $3,699.50 in discovery sanctions against petitioners. Upon completing this review the trial court adopted the referee's recommendations as the court's orders (Tr. 1 at 6:4-8:25; 1 Apx. Vol. VIII 1891:1-1893:7). The trial court also independently reviewed the pleadings and the referee's recommendation on respondent Brooks' motion for judgment on the pleadings (as to specific affirmative defenses of petitioner Schmier) in the Malpractice Action and upon such review adopted same which became the trial court's order (Tr. 1 at 7:23-8:5, 1 Apx. Vol. VIII 1893:8-17).

Petitioners were ordered by the trial court to comply with the reference order and to pay the outstanding referee's fees and discovery sanctions by September 28, 1990 (Tr. 1 at 9:5-10:20; 1 Apx. Vol. VIII 1893:2-1893:26). The trial court warned petitioners that if they failed to pay the discovery sanctions and/or the referee's fee by September 28, 1990, the trial court would sanction petitioners. The trial court told petitioners in open court that the sanctions would include the striking of petitioners' pleadings in the Schmier Action and the Malpractice Action. Petitioners made no mention before the trial court of any alleged inability to pay (Tr. 1 at 9:16-10:20 and 1 Apx. Vol. VIII 1893:27-1894:9). Petitioners were served with written notice of the court's rulings (1 Apx. Vol. VIII 1889-1896). Petitioners did not object to the notice.

Petitioners did not pay the referee's fees or discovery sanctions as ordered. At a status conference on October 3, 1990 (five days *after* the deadline given petitioners by the court), the trial court asked petitioner Schmier personally three times if petitioners intended to pay the fees and sanctions as ordered and three times petitioner Schmier *refused* to do so. The trial court then specifically warned "... I'm prepared to impose a sanction upon you as indicated. . . . You were ordered to pay certain sums and given time to pay it and you haven't done it. . . Do you intend to do so?" orally Petitioner Schmier responded directly: "It is not my intention to pay them." (Tr. 2 at 13:26-14:10). As the entire record reveals, *at no*

time, orally or in writing, did petitioners raise before the trial court the claim that they could not afford to pay the referee's fees and/or the discovery sanctions. (Petitioner Schmier asserted this alleged contention for the first time, on oral argument on appeal, before Division Seven of the California Court of Appeal in 2nd Civ. No. B055266.)

The trial court then struck petitioners' answer and dismissed the cross-complaint in Case No. 691691 and dismissed the complaint in Case No. 742595. On October 15, 1990, the trial court entered the order memorializing its oral orders of October 3, 1990, which is included with the petition herein (1 Rsp. Apx. at 79-86). No judgment was then entered in the malpractice action as the default prove-up hearing had not yet been noticed or heard.

The trial court's order striking petitioners' answer and dismissing the cross-complaint in Los Angeles Superior Court Case No. C691691 and dismissing the complaint in Case No. 742595 and the judgment in Case No. 742595 (as well as an order denying petitioner's motion to vacate reference and imposing discovery sanctions in excess of $750), were appealed by petitioner in 2nd Civ. No. B055266 (1 Apx. Vol. IX at 2083-2085). The judgment and the orders were affirmed by Division Seven of the California Court of Appeal on February 19, 1992, which held: "Having chosen to flout the [trial] court's order, Schmier cannot now complain about the dismissal. It is clear no lesser sanction would have been effective." (Req. Jud. Not. Exhibit "1").[7] Petitioner's petition for

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7. While the opinion in 2nd Civ. No. B055266 was not published, it is the law of the case with regard to these consolidated actions. *Clark v. Deschamps*, 109 Cal. App. 2d 765, 241 P.2d 681, 683 (Cal. App. 1952) [validity of trial judge's orders]; *Selby Constructors v. McCarthy*, 91 Cal. App. 3d 517, 521, 154 Cal. Rptr. 164, 166 (Cal. App. 1979) [applied the doctrine to a *prior unpublished opinion*]; *cf. Pellet v. Sonotone Corp.*, 26 Cal. 2d 705, 708, 160 P.2d 783 (Cal. 1945) [non-suited ruled upon in prior appeal]. The ruling is also *res judicata*, under California law since Schmier's petition for review to the California Supreme Court was denied on May 14, 1992 (Req. Jud. Not. Ex. "2").

review to the California Supreme Court was denied on May 14, 1992 (Req. Jud. Not. Ex. "2"). The remittitur was filed on June 1, 1992 making the decision final and noting that the cause was "Affirmed in Full," (Req. Jud. Not. Ex. "4").

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE UNDERLYING CASE WAS DECIDED UPON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND.

When the state court judgment rests on an independent, state law ground, this Court is without jurisdiction to review the case. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). In determining whether such a non-federal ground exists herein, it is only necessary to review the trial court order (October 15, 1990, attached to petition) and the California Court of Appeal opinion (February 19, 1992, attached to petition). The case turned, at both levels, upon factual issues of consent and waiver.

Since, as a matter of fact, it was determined that petitioners (1) consented to the references; and (2) participated in the reference process without objection and thereby waived any objections thereto, no federal jurisdiction should be asserted here. These factual findings form an independent and adequate state ground for the decision in the underlying case, which is in no way entangled with the alleged federal question which petitioners attempt to raise here.

There can be no question that federal constitutional issues and rights may be waived, even in criminal cases. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478 (1964). Nor is there any question that federal law recognizes that objections to references can be waived by the

party's participation in the reference process and the party's failure to object. *See, e.g., Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (9th Cir. 1981). Therefore, notwithstanding any possible error in deciding federal constitutional questions, and respondents' maintain no such error occurred, the consent and waiver ground is sufficiently broad to uphold the state court judgment. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

These factual findings were upheld by the California Court of Appeal under the state law substantial evidence rule. The standard of review, properly applied, was abuse of discretion. *Young v. Rosenthal*, 212 Cal. App. 3d 96, 123, 260 Cal. Rptr. 369, __U.S. __, *cert. denied*, 110 S. Ct. 1811(Cal. App. 1989). [The trial court has broad discretion to impose discovery sanctions subject to reversal only for arbitrary, capricious, or whimsical action, with the appellant having a very heavy burden of proving abuse of that discretion.] Where a trial court has entered a sanction of dismissal "[t]he order of the trial court is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is Appellants' burden to affirmatively demonstrate error and, where the evidence is in conflict, [the appellate] court will not disturb the trial court's findings." *Laguna Auto Body v. Farmers Insurance Exchange*, 231 Cal. App. Ed. 481, 282 Cal. Rptr. 530 (Cal. App. 1991); *Ellis v. Koshei Corporation*, 145 Cal. 3d 642, 192 Cal. Rptr. 57, 58 fn. 2 (Cal. App. 1983).

This Court does not exercise its jurisdiction to review decisions of state courts decided upon such questions of fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

II.

THE PETITION SHOULD BE DENIED BECAUSE THE STATE COURT DECISION CORRECTLY APPLIED FEDERAL LAW.

What petitioners have failed to focus upon, clearly in an attempt to mislead this Court into improperly granting the requested writ, is that the dismissal in the case from which they appeal here was for failing to pay discovery sanctions and for failure and refusal to obey orders of the trial court. (*See* California Court of Appeal Opinion, February 19, 1992) . Considered in this proper light, the state court decisions were properly decided under both state and federal law.

A. State Court References Do Not Violate Federal Constitutional Law.

Petitioners' acrobatic efforts to find support for their position in the decisions of this Court have resulted only in miscitation of authority to this Court by petitioners. None of the cases relied upon by petitioners reject use of references by state courts on federal constitutional grounds, or on any grounds for that matter. Nor does the reasoning of any case cited by petitioners lead to such a result.

B. There Is No Constitutional Bar To Use Of References At The Federal Or The State Level.

The only case cited by petitioners dealing with references, *LaBuy v. Howes Leather Company, Inc.*, 352 U.S. 249 (1957), deals with federal references pursuant to Federal Rule of Civil Procedure, Rule 53. This Court held in *LaBuy* that "the detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master. . ." *Id.*. at 259. Thus, even under the Federal Rules of Civil Procedure and the *LaBuy* opinion, use of masters or referees to try questions of fact is permissible.

In fact, the disfavor with which use of masters in federal courts has been viewed by this Court, does not rise to a constitutional level. Rather, this Court has reviewed federal references under this Court's supervisory power over the Federal Rules of Civil Procedure and generally over the procedures followed in the federal court system. *See, e.g., LaBuy v. Howes Leather Company, Inc., supra*, at 294 [question reviewed on writ of certiorari due to the "importance of the question is the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals . . ."]. The *LaBuy* case does not interpose any constitutional roadblock to state court use of reference procedures.

The remaining cases relied upon by petitioners lend no support to their argument here. *McDonald v. Smith*, 472 U.S. 479 (1985) [holds only that the petition clause does not require absolute immunity for a defendant charged with making libelous and damaging statements in letter to the President of the United States]; *Minneapolis Star v. Minnesota Comm. of Rev.*, 460 U.S. 575 (1983) [holds that Minnesota's ink and paper tax singles out the press and therefore imposes a heavy burden on that state to justify the law, which the state failed to carry there]; *Gibson v. Berryhill*, 411 U.S. 564 (1963)[holds that a state's optometrist license review board which was made up of self-employed optometrists had a personal interest in decertifying optometrists employed by corporations and entities]; *Rinaldi v. Yeager*, 384 U.S. 305 (1966) [holds that New Jersey statute requiring prisoners to forfeit pay for costs of transcripts for prisoners' appeal was a denial of equal protection]; *Burns v. Ohio*, 360 U.S. 252 (1959) [holds that indigent defendants[8]

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8. Petitioner's arguments based upon their alleged indigent status is disingenuous. They never objected on this ground to the references, before oral argument in the Court of Appeal, or made any offer of proof of inability to pay. Petitioner Schmier is a wealthy labor attorney.

could not be required to pay a filing fe for a criminal appeal]; *Smith v. Bennett*, 365 U.S. 708 (1961) [holds that under a state law an indigent defendant may not be denied *habeas corpus* relief by statutory filing fee]; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) [holds that a state poll tax penalized the poor and interfered with their right to vote]; and *Tumey v. Ohio*, 273 U.S. 510 (1927) [holds that trial before mayor, who got $12 for every conviction, was not upholdable]. Petitioners cite to no cases of this Court or the federal circuit courts of appeal supporting or requiring review here. There are none.

CONCLUSION

Based upon the above arguments and authorities, upon petitioners' miscitations and misrepresentations, upon the independent state ground for decision, and upon the consent and waiver by petitioners, the petition for a writ of certiorari should be denied. Petitioners here were merely "forum shopping" after losing the first motions referred to the referee. The state courts are empowered and entitled to prohibit such conduct, sanction the litigant involved, and enforce the state court's own orders. This is all that happened here and all for just cause, based upon findings supported by substantial evidence.

Respectfully submitted,

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Dated: September 14, 1992

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-296

MICHAEL K. SCHMIER and
MICHAEL K. SCHMIER, A PROFESSIONAL
CORPORATION, Petitioners,

v.

TERRY S. KAPLAN, MICHAEL A. LOTMAN,
COLLISSON & KAPLAN, LAWRENCE BROOKS,
BROOKS INDUSTRIES, INC., Respondents

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Superior Court,
182 Cal.App.3d 431 (1986) 1

Bird v. Superior Court, 112 Cal.App.3d 595
(1980) 1

International Jet Ski Boating Association, Inc.
v. Superior Court (4th Dist. 1991),
232 Cal.App. 3d 112 2

STATUTES

Code of Civil Procedure section 638 2

Code of Civil Procedure section 639 2

Law and Discovery Policy Manual For the
Superior Court County of Los Angeles,
subsection K, paragraphs 241, 243 & 244 2

The thrust of respondents' opposition is their incorrect[1] contention that the lower court case turned "upon factual issues of consent and waiver [and therefore it is unnecessary to reach the question of the constitutionality of the reference statute]. (Resp. Opp. pg. 11, lns. 17-18].

Paragraph 4 (Apx. pg. 8) of the Court of Appeal Discussion, regarding a preliminary and different objection--that the reference was not necessary--was the opinion's only mention of waiver:

> "[appellants] did not object to the lack of necessity when the trial court made its reference order, thus the argument was waived."

This is the only basis of any conclusion that "waiver and consent" could be inferred, a conclusion without authority. This did not follow Bird v. Superior Court, 112 Cal.App.3d 595 (1980) and Aetna Life Ins. Co. v. Superior Court, 182 Cal.App.3d 431 (1986), upon which

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[1]Likewise, respondents' opposition is filled with incorrect statements held out as facts, but rather which consist of respondents' contentions and not Court of Appeal findings. However, the limited purpose of this reply now does not include their itemization and refutation.

appellants relied from the beginning., see International Jet Ski Boating Association, Inc. v. Superior Court (4th Dist. 1991), 232 Cal.App. 3d 112.

And, contrary to any conclusion of consent to the reference, the trial court repeatedly stated on the record that:

"we don't have any agreement (consent) expressed from [petitioners]. . ."

(e.g., Tr. #2, pg. 7, ln. 28-pg. 8, ln. 15).

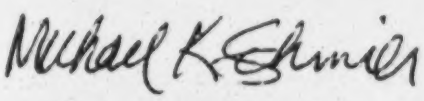
Moreover, consent or agreement is irrelevant as California Code of Civil Procedure specifies a forced reference, i.e. "without consent."

A reference of any other subject matter than those specifically named in section 639 can only be by agreement in writing and signed by all parties, not done here, Code of Civil Procedure section 638, Law and Discovery Policy Manual For the Superior Court County of Los Angeles, subsection K, paragraphs 241, 243 & 244.

Much more importantly, and as these cases hold, waiver of the necessity of the reference argument would have nothing to do with waiver of the jurisdictional

question as to the constitutionality of the statute. The question of constitutionality was never waived and this Court is urged to decide it so that many other people in the future will not be hurt by this.

Respectfully submitted,



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September 27, 1992